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SHIRLEEN GRANVILLE	:	IN THE UNITED STATES DISTRICT
	:	COURT FOR THE MIDDLE DISTRICT
Plaintiff	:	OF PENNSYLVANIA
vs.	:	
	:	CIVIL ACTION - LAW
	:	
AETNA LIFE INSURANCE COMPANY	:	
	:	NO.: 03:14-Civil-0211
Defendant	:	

PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR ATTORNEY FEES AND COSTS

Plaintiff, Shirleen Granville, by and through her attorney, Scott E. Schermerhorn, Esquire, files the within Brief in support of her Motion for an Award of Attorney Fees and Costs pursuant to 29 U.S.C. §1132(g).

I. Procedural Background

This action was initiated on February 7, 2014, by the Plaintiff, Shirleen Granville, against the Defendant, Aetna Life Insurance Company, as a result of its wrongful denial of long term disability (LTD) benefits pursuant to the terms of a long term disability plan. Plaintiff, being of very limited means, filed an application to proceed without paying the filing fee.

During the course of litigation, the parties stipulated to the applicable standard for review, and to proceed by way of cross-motions for summary judgment. On December 15, 2015, this Honorable Court issued a Memorandum Decision *(Doc. 50)* and Order *(Doc. 51)* granting the

Plaintiff's motion for summary judgment, and denying the Defendant's motion for summary judgment.

As the prevailing party, the Plaintiff filed a motion for an award of attorney's fees and costs.

II. Issue

A. Whether the Plaintiff is entitled to an award of attorney's fees and costs pursuant to 29 U.S.C. §1132(g)?

Suggested Answer: Affirmative.

III. Argument

Standard for an Award of Attorney's Fees and Costs

In an ERISA action by a plan participant, beneficiary or fiduciary, the trial court, at its discretion, may award reasonable attorney's fees and costs to either party. ERISA §502(g)(a); 29 U.S.C. §1132(g)(1). ERISA's fee shifting provision was enacted by Congress to advance the underlying purpose of ERISA:

> "The intent of Congress in enacting ERISA was to protect the 'interests of participants in employee benefits plans ... by establishing standards of conduct, responsibility, and obligation for fidiciaries of employee benefit plans.' 29 U.S.C. §1001(b)."

Drennan v. General Motors Corp., 977 F.2d 246, 250 (6th Cir. 1992).

The parties stipulated, and the trial court has ruled, that the plan at issue is governed by 29 U.S.C. §1001, et seq. (ERISA).

The Supreme Court addressed the issue of when attorney's fees are available in an ERISA case. *Hardt v. Reliance Standard Life Ins. Co., 130 S.Ct. 2149 (2010).* The Court borrowed its standard from *Ruckelshaus v. Sierra Club, 463 U.S. 680, 103 S.Ct. 3274, 77 L. Ed. 2d 938 (1983).* The issues addressed by the Court mostly dealt with the degree of success of whether a party was indeed a prevailing party. The party must satisfy a threshold showing of "some degree of success on the merits" and then the court will consider the five policy factors delineated in *Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983)* to determine whether to award attorney's fees and costs. *See Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 103-04 (3d Cir. 2012)*. The policy factors to be considered include:

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorney's fees;

(3) the deterrent effect of an award of attorney's fee against the offending parties;

(4) the benefit conferred on the members of the plan as a whole; and

(5) the relative merits of the parties' position.

Ursic, supra, 719 F.2d at 673. Importantly, "these factors 'are not requirements in the sense that a party must demonstrate all of them in order to warrant an award of attorney's fees, but rather they are elements a court must consider in exercising its discretion.'" *Templin v. Independence Blue Cross, 487 F.App'x, 14 (3d Cir. 2012) (quoting, Fields v. Thompson Printing Co., 363 F.3d 259, 275 (3d Cir. 2004).*

In this action, the Plaintiff, Shirleen Granville, was unquestionably a prevailing party. The trial court granted her motion for summary judgment on the issue of entitlement to long term disability benefits under the Plan, and denying the Defendant's motion for summary judgment seeking to declare the Plaintiff not being entitled to benefits under the Plan. Accordingly, the only issue to be addressed by the trial court is whether the Plaintiff is entitled to attorney's fees and costs pursuant to 29 U.S.C. §1139(g) based upon consideration of the following elements:

Factor (1) - Aetna's Culpability or Bad Faith

The actions demonstrated by Aetna in the handling of the Plaintiff's long term disability claim reflects a well calculated and planned scheme to deprive a covered plan member of disability benefits. Such scheme represents "bad faith" and a breach of the fiduciary duty it owes the Plaintiff as a Plan participant and beneficiary. First, the trial court held that Aetna's denial of the Plaintiff's claim was arbitrary and capricious because it was "without reason" and unsupported by substantial evidence. The trial court further clarified its opinion by stating that Aetna failed to point to any record in evidence contrary to the objective medical evidence of the Plaintiff's disability under the Plan's applicable "own occupation," let alone substantial evidence. (Opinion 12/15/15, p. 13) The Plaintiff argues that the trial court has recognized that Aetna has acted in bad faith and breached its fiduciary duty to the Plaintiff. Second, the trial court recognized in its opinion that Aetna intentionally attempted to mislead the strength of the Plaintiff's medical evidence. The trial court stated that it declined "Aetna's apparent invitation to discount the strength of Dr. Stella's March 14, 2012 APS and August 8, 2012 letter" due to a resident, Dr. Choudhry, examining the Plaintiff versus Dr. Stella. Aetna used this to deny the Plaintiff's claim knowing that a resident would be supervised by Dr. Stella in the very areas noted by the trial court in its opinion. (Footnote 13, Opinion, p. 14) Third, the trial court recognized that Aetna's use of its own physician review (Dr. Swotinsky) had little application to the question before Aetna, i.e., was the Plaintiff disabled from her own occupation? The trial court stated Dr. Swotinsky concluded that there was insufficient evidence to support the treating physician's conclusion of "complete disability" but his task was to evaluate the Plaintiff's disability status as of January 2012 when the test for disability was measured by her own occupation. The trial court concluded that by Dr. Swotinsky's finding Plaintiff capable of sedentary work and not completely disabled did not speak to the less stringent standard, even where her own occupation was classified as sedentary demand level. (Opinion, p. 15) Fourth, the trial court stated that it is "wary of Aetna's failure to conduct an independent medical examination in this case." This is yet another example of the trial court's own recognition of the conduct of Aetna. Fifth, the trial court inferred that Aetna's conduct in denying benefits based on inadequate information and lax investigatory procedures is a procedural factor relevant to the arbitrary and capricious standard. (Opinion, p. 16) And sixth, the trial court specifically held that "Aetna has engaged in multiple procedural irregularities, including conducting a self-serving paper review of the medical files based on the incorrect disability standard, relatedly relying on the opinion of a non-treating, non-examining physician without reason, and denying benefits based on inadequate information and lax investigatory procedures, as evidenced by Aetna's decision not to pursue an independent medical examination and its failure to analyze the specific requirements of Plaintiff's own occupation." (Opinion, p. 18)

The actions by Aetna were designed to use ERISA as a shield to improperly deny plan members of disability benefits knowing that no matter how bad its conduct was, the worst thing that can happen is that it may be ordered to pay the benefits which it actually owes, plus the possibility of interest at a rate most likely less then what Aetna earns on its investments. The intent of ERISA is to protect its plan participants - and not the plan administrator.

The trial court in Footnote 12 made a comment that further reflects the actions of Aetna - "The Court hopes that Aetna is not sending correspondence to Plan participants in this virtually unreadable form. One of the classic indicia of unconscionability is fine print that is so fine as to be impossible to read; this is particularly so when an insurance giant such as Aetna is dealing with a layperson. Defendant's documents are fast approaching this mark of unconscionability." (Footnote

12, Opinion, p. 9) The Plaintiff in this case is not only a layperson, she is of extremely limited means as reflected by her proceeding in this action by application to proceed without a filing fee due to her very limited income and resources. Aetna must not be allowed to handle claims, in such a manner, as noted by the trial court, which Plaintiff argues herein amounts to bad faith.

Aetna's decision to deny the Plaintiff's long term disability benefits was made in bad faith and it must be ordered to pay the Plaintiff's attorney's fees and costs as a result.

Factor (2) - Aetna's Ability to Pay

Aetna has the ability and resources to satisfy an award of attorney's fees and costs. Aetna is one of the largest insurance companies in the United States. The trial court recognized in Footnote 12 of its Opinion that Aetna is an insurance giant. Thus, Aetna's ability to satisfy an award of attorney's fees and costs cannot be disputed.

Factor (3) - Deterrent Effect

Only by awarding attorney's fees to the Plaintiff will Aetna be deterred from summarily denying benefits to a similarly situated plan participant, and from engaging in bad faith conduct as described above. If attorney's fees are note awarded, it will serve as a future incentive for Aetna to deny claims and continue to act in bad faith. This is because Aetna will be able to pay benefits to plan participants that it would legally have to pay under the Plan only when ordered by a court to do so. Many Plan participants would simply not have the means or access to counsel who would undertake the substantial effort to litigate the participant's right to benefits in federal court. Many Plan participants would simply give up when they clearly had a legal right to benefits - such as the Plaintiff in this case. For Aetna, if may engage in conduct recognized by the trial court (i.e., "multiple procedural irregularities, including conducting a self-serving paper review of the medical files based on the incorrect disability standard, relatedly relying on the opinion of a non-treating, non-examining physician without reason, and denying benefits based on inadequate information and lax investigatory procedures, as evidenced by Aetna's decision not to pursue an independent medical examination and its failure to analyze the specific requirements of Plaintiff's own occupation") without any consequence except for paying a claim for benefits that was due in the first instance, and without the need for litigation.

Further, if Aetna is allowed to deny claims and engage in bad faith conduct, without any consequence for an award of attorney's fees and costs, then it will serve as an added incentive to deny all claims, thereby forcing participants into court. Such action will undoubtedly result in many meritorious claims never being pursued by participants which would result in windfalls to Aetna because it may reinvest its money that it should have paid on a legitimate claim. There would be no down side to litigating a case for Aetna. The costs of losing would be payment of benefits that should have been paid in the first instance. Overall, the gain would be enormous to Aetna.

An award of attorney's fees and costs will level the playing field for Aetna and Plan participants. By forcing Aetna to pay attorney's fees and costs to a prevailing plaintiff, it will no longer be "cost effective" for Aetna to litigate a legitimate claim. Then, and only then, would Aetna be forced to perform a proper investigation into a claim. And, it would be deterred from advancing an unmeritorious position. Overall, the purpose of ERISA would be advanced by protecting the plan participants.

Factor (4) - Benefit Conferred on the Members of the Plan as a Whole

The Plaintiff's action, and result, has conferred a benefit upon the members of the Plan as a whole because she has exposed Aetna's bad faith handling of claims. Although it will take an award of attorney's fees and costs to the Plaintiff to significantly deter future conduct by Aetna, the Plaintiff has effectively made it more difficult for Aetna to conduct business as it has done in the past with the trial court's published opinion. In *Glunt v. Life Ins. Co. of N. Am., No. 11-cv-3105, 2012 (U.S. Dist. LEXIS 35710, 2012 WL 895512 (E.D. Pa. Mar. 16, 2012)*, the District Court found that the fourth factor weighed against the plan administrator because other members of the plan would receive a common benefit when the administrator "properly considers medical evidence in the record, thereby reducing the need for costly and time-consuming litigation" if the administrator was deterred from future culpable conduct. Here, the trial court has recognized, among other items, that Aetna did not properly consider the medical evidence in the record. Accordingly, there should be no dispute that the other members of the plan would receive a common benefit by the trial court awarding attorney fees and costs to send a message of deterrence from future culpable conduct to Aetna to reduce the need for costly and time-consuming litigation.

Factor (5) - Relative Merits of the Parties' Position

There was no merit to Aetna's position to deny the Plaintiff's claim for long term disability benefits. This has been recognized by the trial court in its memorandum opinion, as set forth above. Aetna, as a fiduciary, had a duty to act solely in the interests of the plan participants. ERISA 404(a)(1); 29 U.S.C. §1104(a)(1). Aetna was acting in its own self-interest in direct conflict with the applicable provisions of ERISA, as recognized by the trial court. Aetna must be required to pay the Plaintiff's attorney's fees and costs.

Amount of Attorney Fees and Costs is Reasonable

The case dealt with issues involving ERISA law which is extremely complex. The skill required to bring this case to a successful resolution for the Plaintiff, Shirleen Granville, required a level of legal skill, beyond the capabilities of most attorneys who do not practice ERISA work.

Plaintiff's counsel was required to do extensive research which is evident from the thorough briefs submitted to the trial court. The attorney's fees should be awarded in the amount requested.

The customary fee charged by Plaintiff's counsel for ERISA work is $275.00 per hour. This is a reasonable rate for ERISA work, especially in this forum. "The party seeking attorney's fees had the burden to prove that its request for attorney's fees is reasonable. *Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990).* Once the fee petitioner meets this prima facie burden, "the party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee." *Id.* A recent example of the prevailing rate under the lodestar application in the U.S. District Court for the Middle District of Pennsylvania is set forth in *Heffner v. Murphy, No. 08-cv-990 (8/20/12), See Doc. 204.* Neither the parties, nor the court, challenged the rate of $355.00 per hour for an attorney with 37 years of experience. In *Brown v. Trueblue, Inc., 2013 U.S. Dist. LEXIS 158476 (MD Pa. Nov. 5, 2013)*, Judge Kane approved attorney fees much higher than this amount for a federal wage question case. **And in an actual ERISA case in the U.S. District Court for the Western District of Pennsylvania, the court awarded $400.00 per hour as a reasonable rate only 1.5 years ago. *Berkoben v. Aetna Life Ins. Co., 2014 U.S. Dist. LEXIS 97664 (WD Pa. Jul. 18, 2014)***

The Plaintiff's counsel herein has 25 years of trial experience, his first 4 years as a Judge Advocate with the U.S. Marine Corps, and as a Special Assistant U.S. Attorney for the District of South Carolina wherein he experienced many criminal prosecutions and trials. Over the past 21 years, the Plaintiff's counsel has handled extensive federal and state civil litigation, resulting in many trials, in many areas of the law, including those with federal questions and/or statutes. Thus, the rate of $275.00 is reasonable within the forum, especially considering it is much less than approved rates in federal jurisdiction within the Commonwealth of Pennsylvania.

The time expended by Plaintiff's counsel was approximately 66.80 hours over the past 36 months (3 years). Attached as Exhibit "A" is a detailed list of time and description of work performed by Plaintiff's counsel in this case. The total attorney fee is $18,370. The benefit to the Plaintiff by establishing her right to long term disability benefits is significantly higher than this amount.

In conclusion, the Plaintiff was a prevailing party on all aspects of her claim. She is entitled to an award of attorney's fees and costs for the reasons set forth above. The Plaintiff's attorney fee rate is $275.00 which is not only reasonable and customary, but actually less than the approved rates under the Lodestar standard in the Commonwealth of Pennsylvania. Accordingly, the Plaintiff's attorney requests $18,370 as an award of attorney's fees. A request for costs is limited to the $400.00 filing fee to be paid to the Clerk of Courts as a reimbursement due to the Plaintiff having proceeded on an approved application to proceed without paying the filing fee due to her very limited financial means.

IV. Conclusion

WHEREFORE, the Plaintiff, Shirleen Granville, respectfully requests this Honorable Court to enter an Order Awarding Attorney's Fees and Costs in the amount set forth above.

Respectfully submitted,

/s/ *Scott E. Schermerhorn*

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CERTIFICATE OF SERVICE

I, Scott E. Schermerhorn, Esquire, hereby certify that on this 29th day of December, 2015, I have filed the foregoing Plaintiff's Brief in Support of Motion for Award of Attorney's Fee and Costs. I hereby certify my understanding that the following counsel have consented to service through the receipt of electronic notification from the Court of this filing:

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This Certificate of Service and the said filing are intended to be available for viewing and downloading from the ECF system of the United States District Court for the Middle District of Pennsylvania.

/s/ *Scott E. Schermerhorn*

Date: December 29, 2015

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